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No. 89-330

In The

Supreme Court of the United States

October Term, 1989

IRVING J. ROSENBAUM,
Cross-Petitioner,
vs.
DAVIS IRON WORKS, INC.,
Cross-Respondent.

BRIEF IN OPPOSITION
TO CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

CROSS-RESPONDENT ACCEPTS THIS QUESTION
AS STATED BY CROSS-PETITIONER.

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Cross-Respondent Davis Iron Works, Inc. respectfully requests that this Honorable Court deny Cross-Petitioner Irving J. Rosenbaum's Cross-Petition for a Writ of Certiorari to review the portion of the decision of the United States Court of Appeals for the Sixth Circuit which vacated the award of attorneys' fees.

COUNTER-STATEMENT OF THE CASE

(References in parentheses are to the district court's docket entries and related exhibits)

The parties' relationship:

Respondent Irving J. Rosenbaum ("Rosenbaum") was the president, director and majority shareholder of Petitioner Davis Iron Works, Inc. ("Davis") for many years and managed Davis's business affairs. He voluntarily retired on June 8, 1984, at which time he resigned all corporate positions and affiliations. He was never re-employed by Davis nor was there any intention that he return to that employment. The terms of his retirement are reflected in a Stock Redemption Agreement (R. 25: Exhibit C) under which he received $552,000.00 from Davis for his 75% shareholder interest.

The Original Plan:

Davis's original defined benefit pension plan was combined with a trust agreement in one instrument ("Original Plan") (R. 25: Exhibit A), which was qualified under Section 401 of the Internal Revenue Code ("Code"). Rosenbaum was the Original Plan's sole Administrator and Trustee. He was also a participant.

The Original Plan excluded retired employees from its definition of "Participant". (R. 25: Exhibit A, § 1.4; Articles V and VI)

Article XII addressed matters of plan amendment and termination. (R. 25: Exhibit A, Art XII) Trust assets upon plan termination were to be distributed only among the then-employed participants. (R. 25: Exhibit A, § 12.4) The courts below held that Article XII precluded Davis's amending the Original Plan to permit Davis to recover surplus assets upon plan termination.

The Restated Plan:

The Original Plan was restated in 1979 to comply with the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq ("ERISA"). It is hereafter referred to as the "Restated Plan" or "Plan".

Davis was the Plan Administrator (R. 25: Exhibit B, § 3.2), charged with interpreting the Restated Plan and determining all questions arising in its administration and application. The Administrator's determinations were final, conclusive and binding upon everyone unless they were discriminatory or inconsistent with the Restated Plan's tax-exempt qualification under Section 401(a) of the Code or ERISA. The Administrator was also empowered to determine all questions relating to participation and benefit entitlements. (R. 25: Exhibit B, § § 3.5, 7.4, 26.4(f), 28.2)

The Trustee was entitled to demand an acquittance in full satisfaction of all claims against the Plan, the Trustee, the Administrator and Davis upon final payment or distribution to participants pursuant to the Restated Plan's terms. (R. 25: Exhibit B, § 5.6(C))

Rosenbaum was designated by Davis to administer the Restated Plan and also served as Trustee until his retirement. (R. 25: Exhibit B, § 3.2)

The Plan Amendments:

Anticipating retirement, Rosenbaum was informed that the Restated Plan's assets significantly exceeded its obligations. Wishing to allocate most of that excess to himself, he thereupon caused the Plan to be amended to increase retirement benefits. (R. 47: Exhibit 5, pp. 9-11)

Rosenbaum also caused another amendment to be adopted, shortly before his retirement, under which certain marketable securities, cash and annuity contracts,

designated by Rosenbaum and equal to what he believed was the value of his then-accrued pension benefit, were segregated for Rosenbaum's exclusive benefit. (R. 47: Exhibit 6, pp. 12-13) Rosenbaum's segregated account was subject only to its own investment experience; it would not be affected whatsoever by the rest of the trust fund. Rosenbaum's successor trustee was obligated under that amendment to fully comply with Rosenbaum's directions concerning his segregated account. Both corpus and income of the segregated account were to be held by the trustee until Rosenbaum unilaterally decided to withdraw them, without any required date that such withdrawals must commence. Davis was contractually obligated not to rescind that amendment without Rosenbaum's consent. (R. 25: Exhibit C, § 10.1)

The latter amendment was presumably motivated by Rosenbaum's desire to indefinitely defer the federal income tax impact upon him personally upon receipt of his pension benefits.[1] The "lump sum distribution" equivalent of that segregation was expressly recognized. (R. 25: Exhibit C, § 10.1)

The Plan's Termination:

Davis terminated the Plan several months after Rosenbaum's retirement. An overfunding was found to exist which ultimately resulted in residual assets of $63,868.00. Davis and the Trustee promptly advised Rosenbaum of those facts. Those funds reverted to Davis in late 1985.

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[1] Although retirement distributions from qualified plans (such as the one involved here) would normally qualify for tax-deferred rollover into an Individual Retirement Account ("IRA"), IRAs were not permitted to hold insurance contracts. One such insurance contract covering Rosenbaum was a substantial asset which he preferred to retain. Rosenbaum apparently intended that the segregated account would thus provide all of the advantages of a rollover IRA with significantly less restrictions.

The Release:

During the termination process Davis discovered that assets in excess of Rosenbaum's accrued retirement benefit had been segregated. Although Davis, the Trustee and Rosenbaum never disputed the proper (lesser) amount of Rosenbaum's accrued retirement benefit which he should have received upon retirement, they disagreed upon the formula to determine the amount which the Plan was entitled to recover from him, since he had enjoyed the use, earnings and appreciation of assets which belonged to the trust for over sixteen months. Rosenbaum also demanded 75% (the percentage of his stock which was redeemed) of the overfunding, asserting that it was a corporate asset which should have been reflected on Davis's books for purposes of computing the redemption price of his stock under the Stock Redemption Agreement. (R. 25: Exhibit C)

Rosenbaum, Davis and the Trustee all wished to resolve those disputes. On November 1, 1985, Rosenbaum, Davis and the Trustee agreed that Rosenbaum could retain $289,767.43 in value of assets then remaining in his segregated account. (R. 25: Exhibit E, ¶ 12) In agreeing to that amount, Davis and the Trustee permitted Rosenbaum to retain more than the amount to which they believed he was entitled in consideration of Rosenbaum's release of all claims except his disputed claim against Davis for an increased redemption price for his stock (measured by 75% of the reversion) under the Stock Redemption Agreement. That release is contained in the Agreement And Statement Of Retired Participant Irving J. Rosenbaum's Distributable Accrued Benefit dated November 1, 1985 (the "Release"). (R. 25: Exhibit E, ¶ 14)

The State Court Action:

Rosenbaum commenced an action against Davis in state court under the Stock Redemption Agreement, alleging that his redeemed shares were undervalued to the extent of 75% of the reversion.[2] Before the state court could rule on Davis's motion to dismiss, however, Rosenbaum filed this federal ERISA action and was permitted to dismiss his state court action without prejudice.

The Dispute:

Rosenbaum claims a portion of the Restated Plan's surplus assets which reverted to Davis upon termination. He alleges that the Restated Plan improperly permitted that reversion since the Original Plan allegedly precluded it and could not be amended in that regard, notwithstanding the Internal Revenue Service's approval of the Restated Plan permitting it and Rosenbaum's own execution of the Restated Plan as Davis's president and the Plan's Trustee. He also contends that his Release violates ERISA and is therefore unenforceable.

Davis contends that Rosenbaum lacks standing to maintain this action, both under ERISA and under the Original Plan, since he was not a "participant" entitled to any benefits at the time of plan termination. Davis further asserts that the reversion is proper because it was expressly permitted under the Restated Plan and alternatively was either not precluded under the Original Plan or, if prohibited, the Original Plan was permissibly amended to allow it. Davis denies that Rosenbaum's Release is unenforceable.

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[2] That action was specifically contemplated by and excepted from the Release.

The Federal Litigation:

Rosenbaum commenced this ERISA action in the United States District Court for the Eastern District of Michigan. Rosenbaum and Davis filed cross-motions for summary judgment under F.R.Civ.P. 56(a). The district court granted Rosenbaum's motion and denied Davis's. It ordered Davis to return the residual assets to the Plan and awarded Rosenbaum a portion of the reversion. After proof of the hours expended, the district court also ordered Davis to pay Rosenbaum an attorney's fee of $9,862.50 under 29 U.S.C. § 1132(g). (R. 80: Amended Memorandum Opinion and Order, pp. 16-17; R. 123: Order Determining Amount of Attorney Fee Award)

Davis appealed the district court's judgment. On April 19, 1989, in an unpublished opinion, the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment with the exception of the award of the attorney's fee, which the Sixth Circuit vacated.

Davis timely filed its Petition for a Writ of Certiorari (U.S. Supreme Court Docket No. 89-92) on July 17, 1989; Rosenbaum's Cross-Petition for a Writ of Certiorari, seeking review of the Sixth Circuit's vacation of the attorney's fee award, was received by Davis on August 21, 1989.

SUMMARY OF ARGUMENT

The Sixth Circuit considered more than Davis's lack of bad faith; it properly applied the universally accepted five-factor formula and observed the abuse of discretion standard in reaching its decision to vacate the attorney's fee award.

REASON FOR DENYING THE WRIT

THE COURT OF APPEALS PROPERLY APPLIED THE FIVE FACTORS TO BE CONSIDERED WHEN IT RULED THAT THE DISTRICT COURT HAD ABUSED ITS DISCRETION IN AWARDING AN ATTORNEY'S FEE TO CROSS-PETITIONER PURSUANT TO 29 U.S.C. § 1132(g)(1).

Rosenbaum contends that the Sixth Circuit's vacation of the attorney fee award conflicts with the Eighth and Ninth Circuits in the application of the five factors to be considered in awarding attorneys' fees under 29 U.S.C. § 1132(g)(1). He also asserts that the Sixth Circuit departed from the abuse of discretion standard applicable in reviewing an award of attorneys' fees under that section. He concludes that those alleged conflicts provide a basis for a review on writ of certiorari. For the reasons that follow, he is mistaken.

The five-factor test which the Sixth Circuit applied in vacating the district court's award of attorneys' fees to prevailing plaintiffs is identical to that applied in virtually all of the other circuits. *Gray* v. *New England Telephone & Telegraph Company, et al,* 792 F.2d 251, 257 (1st Cir. 1986) (citing cases from the Second, Third, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits); *Central States Pension Fund* v. *888 Corp.,* 813 F.2d 760, 767 (6th Cir. 1987); *Marquardt* v. *North American Car Corporation,* 652 F.2d 715, 717 (7th Cir. 1981). The Sixth Circuit thus did not rely upon an inconsistent test.

The standard of review — abuse of discretion — among the circuits is also not in dispute. In fact, the Sixth Circuit below specifically cited the Ninth Circuit's opinion in *Operating Engineers Pension Trust* v. *Beck Engineering & Surveying Co.,* 746 F.2d 557, 569 (9th Cir. 1984) for that standard. [Sixth Circuit Opinion, pp. 17-18]

Rosenbaum nevertheless asserts that the Sixth Circuit improperly **applied** that standard and that the record does not support its decision because it "apparently relied on only two of the five factors in reaching its decision." [Cross-Petition, p. 7]

The Eighth and Ninth Circuit cases cited by Rosenbaum for the proposition that a conflict exists establish the principle that the mere absence of bad faith on the part of the losing litigant is not alone a reason to deny attorneys' fees to the successful party. They hold that the other factors of the five-part test should also be considered. *Smith* v. *CMTA-IAM Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984); *Landro* v. *Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980); *Terpinas* v. *Seafarer's International Union of North America*, 722 F.2d 1445, 1448 (9th Cir. 1984); *Smith* v. *Retirement Fund Trust*, 857 F.2d 587, 592 (9th Cir. 1988).

The Sixth Circuit agreed with the approach adopted in the Eighth and Ninth Circuits when it acknowledged the five-factor test, reviewed its application by the district court in detail and, in a nineteen page opinion reviewing the many extremely complex issues involved in this case, held:

> "Even taking into account the abuse of discretion standard, we agree with Davis that fees should not have been awarded in this case. The issues in this case are unsettled enough that neither party can be said either to be acting with bad faith or to have an obviously more meritorious position than the other." [Sixth Circuit Opinion, p. 19]

The Sixth Circuit below considered all five factors, as is clearly evident from a fair reading of its entire opinion, notably Section VII (Attorneys' Fees). There is

thus no conflict between the Sixth Circuit's vacation of the attorney's fee award in the instant case and the decisions of the Eighth and Ninth Circuits.

That Davis acted in good faith is undisputed. The first factor (bad faith) was therefore resolved in Davis's favor. But the Sixth Circuit did not vacate the attorneys' fee award on that basis alone.

The record in the Sixth Circuit includes Rosenbaum's admission that the second factor (relative ability to pay) would be in Davis's favor when considering whether attorneys' fees should be awarded **to** Davis. [Appellee's Brief, p. 47]

Davis has presented many complex, meritorious issues in this action. That those issues are not frivolous or insignificant is evidenced in part by the fact that both parties have expended substantial legal effort in analyzing and discussing these issues. Rosenbaum's summary judgment brief in the district court encompassed some thirty-six pages; his appellee's brief in the Court of Appeals was forty-eight pages long. The briefs filed by Davis have also been lengthy. The district court's opinion itself consisted of twenty-one pages; that of the Sixth Circuit comprised nineteen pages. Davis makes those observations to evidence the considerable complexity and variety of the legal issues confronting it when it was required to respond to Rosenbaum's demands in order to determine the correct state of the law vis-à-vis Rosenbaum's pension claims.

Davis was not bound to acquiesce simply because Rosenbaum's interpretation of unsettled law differed from Davis's. Such a suggestion would have a chilling effect upon the legitimate rights of employers and fiduciaries of pension plans to have their ERISA rights considered in the federal courts. Similarly situated

employers and fiduciaries would not — and should not — be deterred from having those types of issues authoritatively resolved in the federal courts. The third factor (deterrence) must thus be resolved in Davis's favor.

Rosenbaum did not wish to resolve a significant legal question or directly benefit anyone other than himself; he only wished to personally reap a windfall. Assuming, *arguendo*, that the reversion to Davis was improper, Rosenbaum's success below on the standing and release issues actually **reduces,** rather than increases, each participant's share of the reversion. The fourth factor (the seeking of benefits for all participants or the resolution of significant legal questions) must also be resolved in Davis's favor.

The Sixth Circuit, after extensively reviewing all of the issues and arguments, concluded that neither party had an obviously more meritorious position than the other. It therefore resolved the fifth factor (relative merits) in Davis's favor. Rosenbaum asserts that such a finding should have been at most a "draw" and therefore not a factor to be considered in reversing the district court's award of fees. He cites no authority for that proposition, however. But even a "draw" weighs against the awarding of fees since it implies that the losing party's position was almost as meritorious as that of the prevailing party. Since a party should prevail in a lawsuit because his or her position is more meritorious, Rosenbaum's logic would effectively always eliminate the fifth factor from the test, regardless of the merits of the losing party's position. No circuit has so held.

For the foregoing reasons, the Sixth Circuit did not misapply either the five-factor test or the abuse of discretion standard when it vacated the attorney's fee award. Its decision is thus not in conflict with those of the other circuits on those points.

Arguendo, if one reads the Eighth and Ninth Circuit cases, *supra,* as holding that "absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily receive attorneys' fees from the defendant", *Smith* v. *CMTA-IAM Pension Trust, supra,* at 590, that holding is clearly unsupported by the cases upon which that Court relied, notably *Hensley* v. *Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

In *Bittner* v. *Sadoff & Rudoy Industries,* 728 F.2d 820, 829 (7th Cir. 1984), the Court observed:

> "[U]nlike [the Civil Rights Attorney's Fees Awards Act construed in *Hensley*], ERISA does not create a presumption in favor of a prevailing plaintiff's request for fees and against a prevailing defendant's. Compare *Iron Workers Local No. 272* v. *Bowen,* 624 F.2d 1255, 1265 (5th Cir. 1980), with *Hensley* v. *Eckerhart,* ___ U.S. ___, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983) and *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). The history of the Civil Rights Attorney's Fees Awards Act indicates as clearly as a legislative history can that the purpose of the statute (despite its neutral wording) was to encourage meritorious civil rights litigation by allowing prevailing plaintiffs to obtain an award of attorney's fees almost as a matter of course but prevailing defendants only if the suit was frivolous. [citations omitted] There is nothing comparable in the legislative history of ERISA; nor do pension plan participants and beneficiaries constitute a vulnerable group whose members need special encouragement to exercise their legal rights, like a racial minority."

In *Janowski* v. *International Brotherhood of Teamsters Local No. 710 Pension Fund*, 673 F.2d 931 (7th Cir. 1982), vacated and remanded for further consideration in light of *Hensley*, the Seventh Circuit stated, at 941:

> "Fee provisions are designed as an enforcement incentive to insure that aggrieved parties who are unable to pay their own attorneys' fees are not denied access to the courts. In situations where aggrieved parties are suing as 'private attorneys general', advancing a public interest, the award of attorneys' fees and costs generally has been automatic, unless special circumstances rendered the award unjust. Thus, the discretionary fee provisions in the civil rights statutes are considered virtually mandatory. The award of fees as an enforcement incentive is not as great, however, in an ERISA action for two reasons. First, fiduciaries have a statutory obligation to insure that plans are properly administered. 29 U.S.C. § 1105. Second, while plan participants may be suing for the benefit of all beneficiaries of a particular fund, they may also be suing merely on their own behalf.
>
> "Accordingly, it is clear that, in light of the policies reflected in ERISA, the need for awarding statutorily authorized attorney's fees to encourage enforcement of the Act is not so compelling that the discretionary provisions should be construed as virtually mandatory. *Iron Workers Local 272* v. *Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980)."

The Seventh Circuit's preceding opinion in *Janowski, supra*, nevertheless affirmed an attorney's fee award to the plaintiffs even though the defendants ultimately prevailed on every substantive challenge to the plan. This

Honorable Court vacated that decision and remanded the attorney fee issue to the district court for further consideration in light of *Hensley*. The Seventh Circuit, following remand, reversed the attorney fee award on the basis that *Hensley* limited attorney fee awards under 42 U.S.C. § 1988 to "prevailing parties". *Janowski* v. *International Brotherhood of Teamsters Local No. 710 Pension Fund*, 812 F.2d 295, 296-297 (7th Cir. 1987).

This Honorable Court's decision in *Hensley* did not authorize any presumption of an award of attorneys' fees to prevailing plaintiffs in ERISA cases. To the contrary, it *limited* those awards. *Hensley* v. *Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40 (1983).

In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), this Honorable Court considered the award of attorneys' fees in actions under Title II of the Civil Rights Act of 1964, holding, 390 U.S. at 402, 88 S.Ct. at 966:

> "When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. [footnote omitted] If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injuctive powers of the federal courts. Congress therefore enacted the provision for counsel fees — not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals

> injured by racial discrimination to seek judicial relief under Title II. [footnote omitted]
>
> "It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

The "special circumstances" test for awarding attorneys' fees in civil rights actions was not intended to, nor should it, apply to ERISA cases. *Janowski, supra.* The adoption of that test in ERISA cases would effectively emasculate, if not entirely eliminate, the five-factor test.

The congressional intent underlying the enactment of 29 U.S.C. § 1132(g)(1) was to permit the federal courts, in their discretion, to award attorneys' fees under the circumstances considered in the five-factor test, not to require a liberal construction of Section 1132(g) in favor of a successful participant. *McKnight* v. *Southern Life and Health Insurance Company,* 758 F.2d 1566, 1572 (11th Cir. 1985). The federal courts have virtually unanimously applied the five-factor test in implementing 29 U.S.C. § 1132(g)(1) in considering whether to exercise their discretionary authority. If Congress had intended a bias, it could (and would) have explicitly provided therefor.

The Sixth Circuit's application of the five-factor test, without considering the "special circumstances" test reserved for civil rights cases, was correct and should be upheld.

CONCLUSION

For the foregoing reasons, Davis submits that the decision of the Sixth Circuit below in vacating the district court's award of attorneys' fees to Rosenbaum does not conflict with the decisions of any other circuit or any other provision of law and thus does not present a justiciable basis for the granting of his Cross-Petition for Writ of Certiorari. Even if, *arguendo*, such a conflict does exist, the Sixth Circuit's decision below vacating the award of attorneys' fees was correct and should be upheld.

Davis respectfully requests that this Honorable Court therefore deny the Cross-Petition for Writ of Certiorari to review the portion of the decision of the United States Court of Appeals for the Sixth Circuit which vacated the award of attorneys' fees.

Respectfully submitted,

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